126

No. ___ Original

In The

Supreme Court of the United States

October Term, 1997

STATE OF KANSAS,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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May 1998

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STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Comes now the State of Kansas, by and through the Attorney General of Kansas Carla J. Stovall, pursuant to the authority of the Attorney General under the laws of the State of Kansas and pursuant to Kansas House Concurrent Resolution No. 5030, 1998 Kan. Sess. Laws, and moves the Court for leave to file the accompanying Bill of Complaint.

Respectfully submitted,

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STATE OF KANSAS,

Plaintiff,

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STATE OF COLORADO

BILL OF COMPLAINT

The State of Kansas, by its Attorney General Carla J. Stovall, brings this suit seeking relief against the Defendant, State of Nebraska, and for its cause of action states:

1. The jurisdiction of the Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and Paragraph (a), Section 1251, Title 28, of the United States Code.

2. The Republican River is an interstate river which rises in the plains of northeastern Colorado, northwestern Kansas, and southwestern Nebraska, flows east through southern Nebraska, roughly paralleling the Kansas-Nebraska Stateline, and then, at a point east of Guide

Rock, Nebraska, it turns south into the State of Kansas, where it joins the Smoky Hill River to form the Kansas River, which then flows east through Topeka to Kansas City, where it in turn joins the Missouri River. The Republican River is a major source of water for the State of Kansas.

3. Flood control and reclamation projects have been constructed and are operated by the Federal Government on the mainstem and in the tributary sub-basins of the Republican River. The combined flows of the Republican River and its tributaries are impounded by the mainstem Harlan County Dam constructed and operated by the Federal Government for flood control and irrigation purposes in the States of Nebraska and Kansas.

4. The waters of the Republican River have been equitably apportioned among the three States by means of an enforceable interstate compact. The Republican River Compact was negotiated pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States and pursuant to the specific consent of Congress in the Act of August 4, 1942, 56 Stat. 736. The Republican River Compact was entered into by the States of Colorado, Kansas, and Nebraska on the basis of an agreement reached on December 31, 1942, which was subsequently ratified by the legislatures of the State of Colorado in the Act of March 15, 1943 (Colo. Rev. Stat. §§ 37-67-101, 102 (1990)), the State of Kansas in the Act of February 22, 1943 (Kan. Stat. Ann. § 82a-518 (1997)), and the State of Nebraska in the Act of February 24, 1943 (Neb. Rev. Stat. Vol. 2a, App. 1-106 (1995)). Congress consented to the Republican River Compact, and President Roosevelt approved it on May 26, 1943. 57 Stat. 86. A copy of the

Republican River Compact is attached as the Appendix to this Complaint.

5. Article III of the Republican River Compact sets out the initially determined average annual "virgin water supply" of the Republican River Basin, including its sub-basins.

6. Article IV of the Republican River Compact allocates the virgin water supply of the Republican River Basin, including the sub-basins thereof, to the three compacting States, for beneficial consumptive use. Article III provides for the adjustment of the States' allocations if the virgin water supply varies more than ten percent.

7. The State of Nebraska has breached its solemn obligation to abide by the Compact, a law of the United States, by allowing the proliferation and use of thousands of wells hydraulically connected to the Republican River and its tributaries, by the failure to protect surface flows from unauthorized appropriation by Nebraska users, and by other acts and omissions. These acts and omissions have resulted in the appropriation by the State of Nebraska of more than its allocated equitable share of the waters of the Republican River and have deprived the State of Kansas of its full entitlement under the Compact.

8. The State of Nebraska has reported to the Republican River Compact Administration water use in excess of its allocation under the Compact but claims that groundwater use is not regulated by the Compact.

9. As a result of the State of Nebraska's failure to deliver water to Kansas in the quantities allocated under

the Compact, the State of Kansas has suffered grave and substantial injuries.

10. The State of Nebraska has not regulated and does not regulate groundwater use in the Republican River Basin for purposes of complying with the Republican River Compact. Nebraska's failure to regulate such use has encouraged Nebraska water users to increase pumping, thereby exacerbating violations of the Compact.

11. The State of Nebraska is even now allowing new wells, increased pumping, and increased use of groundwater in the Republican River Basin in Nebraska. Such additional wells, increased pumping, and increased use are exacerbating the shortages to Kansas caused by the violations of the Republican River Compact that are already occurring, to the substantial and irreparable injury of the State of Kansas.

12. Unless relief is granted by this Court, increasing illegal water use in Nebraska in excess of the State of Nebraska's equitable share of the waters of the Republican River will result in substantial and irreparable injury to the State of Kansas.

13. The State of Nebraska has taken no action to rectify its violations of the Republican River Compact, despite numerous requests to do so by the State of Kansas in the forum of the Republican River Compact Administration. The State of Nebraska has exercised its unilateral authority under the Compact to veto all requests by the State of Kansas that the Administration address the violations.

14. The State of Kansas attempted to settle its differences with the State of Nebraska for a number of years, and most recently through professionally mediated negotiations for a period of more than a year. All such efforts have proven fruitless.

15. The State of Kansas has no adequate remedy at law to enforce its rights under the Republican River Compact against the State of Nebraska.

16. The State of Kansas has no adequate remedy for past, continuing, and future violations of the Republican River Compact by the State of Nebraska except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Kansas respectfully prays that the Court:

A. Award to the State of Kansas all damages and other relief, including pre- and post-judgment interest, appropriate fully to remedy the injury suffered by the State of Kansas by reason of the State of Nebraska's past and continuing violations of the Republican River Compact.

B. Issue its decree commanding the State of Nebraska in the future to deliver the waters of the Republican River in accordance with the provisions of the Republican River Compact.

C. Grant such costs and further relief as the Court deems just and proper.

Respectfully submitted,

CARLA J. STOVALL
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JOHN W. CAMPBELL
Senior Deputy Attorney General

DONALD L. PITTS
Assistant Attorney General

LELAND E. ROLFS
Special Assistant Attorney General

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May 1998

Appendix to Bill of Complaint
The Republican River Compact as
Enacted by Congress
57 Stat. 86 (1943)

AN ACT

To grant the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska relating to the waters of the Republican River Basin, to make provisions concerning the exercise of Federal jurisdiction as to those waters, to promote flood control in the Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact authorized by the Act entitled "An Act granting the consent of Congress to the States of Colorado, Kansas, and Nebraska to negotiate and enter into a compact for the division of the waters of the Republican River", approved August 4, 1942. (Public Law 696, Seventy-seventh Congress; 56 Stat. 736), signed by the commissioners for the States of Colorado, Kansas, and Nebraska at Lincoln, Nebraska, on December 31, 1942, and thereafter ratified by the Legislatures of the States of Colorado, Kansas, and Nebraska, which compact reads as follows:

"REPUBLICAN RIVER COMPACT

"The States of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a State, or collectively as the States), having resolved to conclude a compact with respect to the waters

of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, Chapter 545, 2nd Session) and pursuant to Acts of their respective Legislatures have, through their respective Governors, appointed as their Commissioners:

M.C. Hinderlider, for Colorado
George S. Knapp, for Kansas
Wardner G. Scott, for Nebraska

who, after negotiations participated in by Glenn L. Parker, appointed by the President as the Representative of the United States of America, have agreed upon the following articles:

"Article I

"The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

"The physical and other conditions peculiar to the Basin constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any

general principle or precedent with respect to any other interstate stream.

"Article II

"The Basin is all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas. The main stem of the Republican River extends from the junction near Haigler, Nebraska, of its North Fork and the Arikaree River, to its junction with Smoky Hill River near Junction City, Kansas. Frenchman Creek (River) in Nebraska is a continuation of Frenchman Creek (River) in Colorado. Red Willow Creek in Colorado is not identical with the stream having the same name in Nebraska. A map of the Basin approved by the Commissioners is attached and made a part hereof.

"The term 'Acre-foot' as herein used, is the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet.

"The term 'Virgin Water Supply' as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

"The term 'Beneficial Consumptive Use' is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

"Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated.

"Article III

"The specific allocations in acre-feet hereinafter made to each State are derived from the computed average annual virgin water supply originating in the following designated drainage basins, or parts thereof, in the amounts shown:

"North Fork of the Republican River drainage basin in Colorado, 44,700 acre-feet;
"Arikaree River drainage basin, 19,610 acre-feet;
"Buffalo Creek drainage basin, 7,890 acre-feet;
"Rock Creek drainage basin, 11,000 acre-feet;
"South Fork of the Republican River drainage basin, 57,200 acre-feet;
"Frenchman Creek (River) drainage basin in Nebraska, 98,500 acre-feet;
"Blackwood Creek drainage basin, 6,800 acre-feet;
"Driftwood Creek drainage basin, 7,300 acre-feet;
"Red Willow Creek drainage basin in Nebraska, 21,900 acre-feet;
"Medicine Creek drainage basin, 50,800 acre-feet;
"Beaver Creek drainage basin, 16,500 acre-feet;
"Sappa Creek drainage basin, 21,400 acre-feet;
"Prairie Dog Creek drainage basin, 27,600 acre-feet;

"The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and Arikaree River and the

lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

"Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

"Article IV

"There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin, 10,000 acre-feet;
"Arikaree River drainage basin, 15,400 acre-feet;
"South Fork of the Republican River drainage basin, 25,400 acre-feet;
"Beaver Creek drainage basin, 3,300 acre-feet; and

"In addition, for beneficial consumptive use in Colorado, annually, the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and of the Red Willow Creek drainage basin in Colorado.

"There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This

total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"Arikaree River drainage basin, 1,000 acre-feet;
"South Fork of the Republican River drainage basin, 23,000 acre-feet;
"Driftwood Creek drainage basin, 500 acre-feet;
"Beaver Creek drainage basin, 6,400 acre-feet;
"Sappa Creek drainage basin, 8,800 acre-feet;
"Prairie Dog Creek drainage basin, 12,600 acre-feet;

"From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

"In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

"There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin in Colorado, 11,000 acre-feet;
"Frenchman Creek (River) drainage basin in

Nebraska, 52,800 acre-feet;
"Rock Creek drainage basin, 4,400 acre-feet;
"Arikaree River drainage basin, 3,300 acre-feet;
"Buffalo Creek drainage basin, 2,600 acre-feet;
"South Fork of the Republican River drainage basin, 800 acre-feet;
"Driftwood Creek drainage basin, 1,200 acre-feet;
"Red Willow Creek drainage basin in Nebraska, 4,200 acre-feet;
"Medicine Creek drainage basin, 4,600 acre-feet;
"Beaver Creek drainage basin, 6,700 acre-feet;
"Sappa Creek drainage basin, 8,800 acre-feet;
"Prairie Dog Creek drainage basin, 2,100 acre-feet;

"From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of up-stream basins otherwise unallocated herein, 132,000 acre-feet.

"The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

"Article V

"The judgment and all provisions thereof in the case of Adelbert A. Weiland, as State Engineer of Colorado, et al, v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U.S. 498, affecting the Pioneer Irrigation ditch or canal, are hereby recognized as binding upon the States; and Colorado, through its duly

authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

"The water heretofore adjudicated to said Pioneer Canal by the District Court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.

"Article VI

"The right of any person, entity, or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper State for the purpose of regulating water herein allocated for beneficial consumptive use in such lower State, shall never be denied by an upper State; provided, that such right is subject to the rights of the upper State.

"Article VII

"Any person, entity, or lower State shall have the right to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivisions of the State in which such works are located, each and every year during which such rights are enjoyed

for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said political subdivisions of the State.

"Article VIII

"Should any facility be constructed in an upper State under the provisions of Article VI, such construction and the operation of such facility shall be subject to the laws of such upper State.

"Any repairs to or replacements of such facility shall also be made in accordance with the laws of such upper State.

"Article IX

"It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

"The United States Geological Survey, or whatever federal agency may succeed to the functions and duties of that agency, insofar as this compact is concerned, shall collaborate with the officials of the States charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and

publication of water facts necessary for the proper administration of this compact.

"Article X

"Nothing in this compact shall be deemed:

"(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

"(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

"(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any State to any extent other than the extent these laws would apply without regard to this compact.

"Article XI

"This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

"(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

"(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

"(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law

prior to the initiation or authorization of the federal program or project which causes such impairment.

"IN WITNESS WHEREOF, the Commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the States.

"Done in the City of Lincoln, in the State of Nebraska, on the 31st day of December, in the year of our Lord, one thousand nine hundred forty-two.

"M. C. HINDERLIDER
"Commissioner for Colorado
"GEORGE S. KNAPP
"Commissioner for Kansas
"WARDNER G. SCOTT
"Commissioner for Nebraska

"I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.

"GLENN L. PARKER
"Representative of the United States"

Sec. 2(a) In order that the conditions stated in article XI of the compact hereby consented to shall be met and that the compact shall be and continue to be operative, the following provisions are enacted –

(1) any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by such compact, shall be made within the allocations made by such compact for

use in that State and shall be taken into account in determining the extent of use within that State;

(2) the United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of such compact and after consultation with all interested Federal agencies and the State officials charged with the administration of such compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(3) the United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters: *Provided*, That such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with such compact at the time of the impairment thereof, and was validly initiated under State law prior to the initiation or authorization of the Federal program or project which causes such impairment.

(b) As used in this section –

(1) "beneficial consumptive uses" has the same meaning as when used in the compact consented to by Congress by this Act; and

(2) "Basin" refers to the Republican River Basin as shown on the map attached to and made a part of the original of such compact deposited in the archives of the Department of State.

Approved May 26, 1943.

No. ___, Original

In The

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October Term, 1997

STATE OF KANSAS,

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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No. ___, Original

In The

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October Term, 1997

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of Kansas in support of its Motion for Leave to File Bill of Complaint submits the following:

STATEMENT

The State of Kansas seeks to invoke the Court's original jurisdiction to enforce her rights under the Republican River Compact of 1943 (the "Compact"), 57 Stat. 86, a copy of which is attached as the Appendix to the Bill of Complaint. The Attorney General of Kansas brings this action on behalf of the State of Kansas pursuant to her

inherent authority and pursuant to a resolution of both houses of the Kansas Legislature, House Concurrent Resolution No. 5030, 1998 Kan. Sess. Laws, adopted February 27, 1998, attached to this Brief as Appendix A. The essence of the claim is that postcompact groundwater development in Nebraska has deprived, and threatens to increasingly deprive, Kansas of its allocated share of water under the Republican River Compact. Kansas' attempts through the Republican River Compact Administration (the "Compact Administration" or "RRCA") to address Nebraska's overappropriation have proven futile.

The State of Colorado is named as a defendant because it is the third compacting State under the Republican River Compact, but no relief is sought against Colorado in the Bill of Complaint.

1. The Republican River Basin

The Republican River (the "River") is an interstate river located in parts of the States of Colorado, Nebraska, and Kansas. According to the U.S. Bureau of Reclamation ("USBOR" or the "Bureau"), the River "is located in one of the most productive agricultural regions of the United States, with large acreages of winter wheat, sorghum grain and silage, dry beans, corn and sugar beets." Bureau of Reclamation, U.S. Dep't of Interior, Resource Management Assessment, Republican River Basin 4 (1996) [hereinafter 1996 RMA]. It rises in the plains of northeastern Colorado, northwestern Kansas, and southwestern Nebraska, flows east through southern Nebraska, roughly paralleling the Kansas-Nebraska Stateline, and then, east of Guide Rock, Nebraska, it turns

south into the State of Kansas, where it joins the Smoky Hill River to form the Kansas River, which then flows east through Topeka, the State capital, and other municipalities down to Kansas City where it joins the Missouri River. The drainage area of approximately 24,900 square miles consists of 7,700 square miles in Colorado, 9,700 square miles in Nebraska, and 7,500 square miles in Kansas. Bureau of Reclamation, U.S. Dep't of Interior, Special Report: Republican River Basin Management Study 1 (1985) [hereinafter 1985 USBOR Report]. The watershed has an approximate length of 430 miles. 1996 RMA at 3. A map of the Republican River Basin (the "Basin") is attached to this Brief as Appendix B.

The number of acres irrigated in the Republican River Basin in Nebraska in 1949 was 90,352. 1996 RMA, Table D-13. Following Congressional consent and Presidential approval of the Compact in 1943, the Bureau and the United States Army Corps of Engineers (the "Corps") proceeded with the planning and development of projects in the Basin. The federal projects in place today include a system of seven Bureau project reservoirs and six irrigation districts, together with the Harlan County Reservoir in Nebraska and the Milford Reservoir in Kansas, which the Corps constructed and operates. Most of the Bureau of Reclamation irrigation projects went into operation in the early 1950s. See *id.*, at 13-14. Bureau project water now serves 88,877 acres in Nebraska. See *id.*, at 22-23. Additional irrigated acreage has been developed in Nebraska during and since the development of the federal irrigation projects, bringing the total irrigated acreage to 1,045,354 acres in 1992. See *id.*, Table D-7.

There were several hundred wells in the Nebraska portion of the Republican River Basin at the time the Compact was adopted. 1985 USBOR Report 34-43. By 1995 the number of wells had risen to over 10,000 in the Nebraska portion of the Republican River Basin. Nebraska Dep't of Water Resources, 1995 Well Registration Database. The increasing number of wells in the Nebraska portion of the Republican River Basin is shown graphically for the years 1943-1996 in Appendix C attached to this Brief.

A significant part of the water allocated to the State of Kansas under the Republican River Compact comes from inflows to Harlan County Reservoir, the largest of the five federal reservoir projects in the portion of the Basin located in the State of Nebraska. Flows into Harlan County Reservoir have steadily decreased. The historic mean annual flow at the location of Harlan County Reservoir for 1936-1950 was 534,900 acre-feet. The historic mean annual inflow into Harlan County Reservoir for 1980-1993 was 160,400 acre-feet. 1996 RMA at 29. A recent Bureau report describes the situation:

> "With the advent of center pivot irrigation systems, there was a marked increase in the number of irrigation wells constructed in the 1960's and 1970's. Many of these wells are located in aquifers adjacent to the Republican River and its tributaries. In some areas, well construction may have lowered aquifer levels, resulting in a decrease in the historical discharge from the aquifers to the streams. Reduced aquifer discharge has contributed to a reduction in the volume of surface water in the Republican River Basin." 1996 RMA at 1.

Precipitation has remained essentially constant since the precompact period. *Id.*, Attachment B, Part VI, Tables 4-6.

2. The Republican River Compact

The Republican River Compact was intended, among other things, to provide for the equitable division of the waters of the Republican River Basin and "to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods." Compact, Art. I. The full text of the Compact is the Appendix to the Bill of Complaint submitted herewith.

The Republican River Compact can be contrasted with the Arkansas River Compact between Colorado and Kansas with respect to maintenance of the status quo at the time of the adoption of the compact. As indicated above, the surface waters of the Republican River Basin were largely undeveloped at the time the Republican River Compact was adopted in 1943. This lack of development on the Republican River is quite different from the situation in the Arkansas River Valley when the Arkansas River Compact was adopted. There the Arkansas River flows were already overappropriated. 1 Special Master Report 55 (1994), *Kansas v. Colorado*, 514 U.S. 673 (1995). Thus, the purpose of the Republican River Compact was not to maintain the status quo, as it was for the Arkansas River Compact, see *id.*, at 89, but to provide a framework of State allocations within which development could take place.

The Compact allocates Basin waters to each State in specific acre-foot[1] amounts based on the average annual "virgin water supply" as of the time of the adoption of the Compact. Compact, Arts. III, IV. The Compact defines virgin water supply as "the water supply within the Basin undepleted by the activities of man." *Id.*, Art. II. Each State's allocation is for "beneficial consumptive use," defined as consumption of water "by the activities of man." *Id.* The Compact allocates the waters of individual sub-basins and the mainstem to the States and limits the consumptive use of each State accordingly. *Id.*, Art. IV. Kansas has a right to receive its mainstem allocation at two delivery points: 1) the diversion dam at Guide Rock, Nebraska, 60 river miles below Harlan County Reservoir, for use in Kansas by the Kansas Bostwick Irrigation District; and 2) the Stateline gauge near Hardy, Nebraska. *Id.* ("provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; ") The Compact requires adjustment of the States' allocations whenever the virgin water supply varies more than ten percent from the average annual virgin water supply set out in the Compact. *Id.*, Art. III.

Article IX of the Compact provides for the adoption of rules and regulations by unanimous action of the three States acting through their designated officials. Pursuant to that authority, on July 15, 1959, the appropriate state officials created a formal administrative body, composed of themselves and designated the "Republican River

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[1] One acre-foot is 325,851 gallons. The volume of the Supreme Court Courtroom, within the pillars, from floor to ceiling, is approximately 3⅓ acre-feet.

Compact Administration" The Compact Administration studied methods to quantify on a yearly basis the Basin's annual "virgin water supply" and each State's annual consumptive use. In the early 1960s, it adopted virgin water supply and consumptive use formulas which are now set forth, as modified, in current regulations of the Compact Administration. See RRCA, Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use (Rev'd 1990). The regulations provide that water pumped by wells from the alluvium along the stream channel shall be included in the Administration's formulas for virgin water supply and consumptive use, while the inclusion of water pumped by "upland" or Ogallala aquifer wells would have to await further research and data. *Id.*, at 7.

3. The Present Controversy and Attempts at Resolution

In many years Nebraska has reported to the Compact Administration annual consumptive use in excess of its allocations. See, *e.g.*, RRCA, 19th Annual Report 13-14 (1979); RRCA, 30th Annual Report 18-19 (1990); RRCA, 31st Annual Report 12-13 (1991). Such reports do not include consumptive use associated with groundwater pumping from the "upland" or Ogallala aquifer wells. In particular, during the drought of 1989 to 1992, Nebraska reported using considerably more than its Compact allocations. *Id.*

In Nebraska, the Director of the Department of Water Resources has traditionally been responsible for regulating surface water use under a system of prior appropriation,

while local units of government, known as natural resource districts (NRDs), are responsible for groundwater management and regulation. Neb. Rev. Stat. §§ 46-656.01 et seq. (Cum. Supp. 1996). The local NRDs may place temporary suspensions on future groundwater development. However, the NRDs have refused to restrict groundwater use within their districts for the benefit of surface flows even though groundwater use has been found by the Bureau and others to have a substantial impact on surface flows. See, *e.g.*, 1996 RMA at 14.

For over a decade, Kansas has voiced concerns regarding Nebraska's failure to comply with the Compact. Kansas has diligently searched for a solution through the Compact Administration, public meetings, a joint legislative committee meeting, and professionally facilitated mediation, all without success.

In 1984, the Compact Administration's Engineering Committee recommended that the Administration, "[d]iscourage future ground water development in alluvial aquifers or implement a moratorium on ground water development in alluvial aquifers." RRCA, 25th Annual Report 10 (1985). In response, the Nebraska Commissioner, who is also the Director of the Nebraska Department of Water Resources, disclaimed authority to impose a moratorium on the development of new wells in the Basin. *Id.* at 7.

Over the next two years, Kansas continued to express its concerns about depletions of stream flow and the need for enforcement of Compact allocations. RRCA, 26th Annual Report 8 (1986); RRCA, 27th Annual Report 11 (1987).

In response to continued Kansas complaints at Compact Administration meetings, Nebraska suggested in 1988 that Kansas submit a written proposal for review by the Compact Administration and agreed to give full consideration to any such proposal. RRCA, 28th Annual Report 13-15 (1988). At the next annual meeting, Kansas submitted a proposal addressing groundwater pumping. RRCA, 29th Annual Report 12-13 (1989). However, Nebraska vetoed the Kansas proposal. RRCA, 30th Annual Report 1-15 (1990). Nebraska has yet to submit a proposal addressing either its overuse or the detrimental impact of groundwater pumping on surface flows.

In recent years Nebraska has taken the position that the Compact does not govern groundwater pumping. Kansas has opposed this view. RRCA, 30th Annual Report 13 (1990). This dispute has continued at subsequent annual Compact Administration meetings. See, *e.g.*, RRCA, 32d Annual Report 7-10 (1992). In 1995, after vetoing another Kansas proposal addressing groundwater pumping, Nebraska presented its only proposal in ten years, a resolution by the Nebraska Legislature proposing to renegotiate the Compact. RRCA, 35th Annual Report 19-23 Exs. 1, 7, 9 (1995).

The State of Kansas has made substantial efforts to settle the current controversy not only in the forum of the Republican River Compact Administration, but also in direct meetings with Nebraska legislators and water users. A joint meeting of legislative committees from the two States in 1993 failed to produce any resolution to the disagreement over lack of Compact compliance by

Nebraska. In 1994 and 1995 Kansas officials attended an extensive series of public meetings in Nebraska to explain Kansas' concerns about Nebraska's Compact violations. No resolution of the controversy resulted.

In 1995, at the suggestion of Nebraska, Kansas agreed to enter into mediated negotiations for a period of five months. The negotiations were mediated by a professional mediation firm with substantial national and international experience. Kansas subsequently agreed to extend the mediation for an additional 11 months. A three-person negotiation team from each State participated in approximately 14 two-day sessions over the 16-month period. Extensive staff time and expense was devoted to the mediation process by both States. A draft Preliminary Option for Settlement (POS) was developed by the States. After extensive public hearings on the POS in both States, it became clear that the support of the Nebraska water users could not be obtained. As a result, the mediated negotiations were reluctantly terminated by Kansas on March 6, 1997.

In late 1997, the local water user organizations in Nebraska developed a proposal, without State of Nebraska endorsement, that would have allowed the current violations to increase. Consequently, this proposal was unacceptable to the State of Kansas. Later, the Governor of Kansas invited the Governor of Nebraska to submit a meaningful proposal as a basis for further discussions. Nebraska's Governor declined, asserting that the request for a proposal was unreasonable, and that he was unavailable to meet with Kansas' Governor on the eight different occasions offered.

ARGUMENT

The Court has stated that it will examine two factors in determining whether a case is appropriate for exercise of the Court's original jurisdiction: (1) " 'the nature of the interest of the complaining state,' focusing on the 'seriousness and dignity of the claim' "; and (2) "the availability of an alternative forum in which the issue tendered may be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). These factors will be examined in order with respect to the present controversy. It may be noted at the outset that the Court has exercised its original jurisdiction in recent years to determine the rights between States to waters of an interstate stream that are equitably apportioned under a compact. See *Kansas v. Colorado*, 475 U.S. 1079 (1986) (granting leave to file complaint); *Kansas v. Colorado*, 514 U.S. 673 (1995) (finding violation of the Arkansas River Compact by Colorado); *Texas v. New Mexico*, 421 U.S. 927 (1975) (granting leave to file complaint); *Texas v. New Mexico*, 482 U.S. 124 (1987) (finding violation of the Pecos River Compact by New Mexico). In these cases the "seriousness and dignity of the claim" were such that, given the absence of an alternative forum, the Court's exercise of its original jurisdiction was justified.

1. The Seriousness and Dignity of Kansas' Claim Warrant Exercise of the Court's Original Jurisdiction

The seriousness and dignity of Kansas' present claim weigh heavily in favor of the Court's exercise of original jurisdiction here. This case meets the most severe test for

exercise of original jurisdiction: "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983), *quoted in Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Black's Law Dictionary defines *casus belli* as "an occurrence giving rise to or justifying war." Black's Law Dictionary 275 (rev'd 4th ed. 1968). The "cause of every just war is injury, either already done or threatened." Vattel, Law of Nations 301 § 26 (J. Chetty ed., 7th ed. 1849). In this instance, the injury is both already done and threatened. A sure sign that the State of Kansas considers the violations of the Republican River Compact by Nebraska to be equivalent to *casus belli* is the adoption by the Kansas Legislature of House Concurrent Resolution No. 5030, attached to this Brief as Appendix A. This is the State counterpart of a declaration of war by Congress under Article I, Section 8, Clause 11 of the U.S. Constitution ("The Congress shall have Power To declare War. "). The interstate compact under the U.S. Constitution is the international treaty between sovereign States adapted to the federal system of the United States. Violation of an international treaty is one of the classic occurrences giving rise to or justifying war.

The Republican River Compact allocates all of the waters of the Republican River Basin among Kansas, Colorado, and Nebraska. See Compact, Arts. I, III, IV. Therefore, groundwater use that depletes allocated surface flows can violate the Republican River Compact. See *Kansas v. Colorado*, 514 U.S. 673 (1995); *Texas v. New Mexico* 482 U.S. 124 (1987). Nebraska has deprived Kansas of its

allocated share of Republican River water and has violated the Compact by effecting an enormous increase in groundwater pumping in the Republican River Basin in recent decades. See Appendix C of this Brief for a graphical description of the increase in the number of Nebraska wells.

The rapid proliferation of wells in Nebraska resembles the circumstances in *Kansas v. Colorado*, 514 U.S. 673 (1995) (Arkansas River) and *Texas v. New Mexico*, 482 U.S. 124 (1987) (Pecos River). The violations in the present case appear, however, to be considerably greater. This conclusion is consistent with the greater irrigated area in Nebraska than in the upstream States in the earlier cases. The area irrigated in 1992 in the Republican River Basin in Nebraska was approximately 1,000,000 acres, as compared to approximately 320,000 acres in the Arkansas River Basin in Colorado and approximately 160,000 acres in the Pecos River Basin in New Mexico. See 1996 RMA, Table D-7; 2 Special Master Report 268-270 (1994), *Kansas v. Colorado*, 514 U.S. 673 (1995); Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact 9 (1979), *Texas v. New Mexico*, 446 U.S. 540 (1980). Thus, the potential for compact violations is considerably greater in this case than it was in either the Arkansas River or the Pecos River cases.

Perhaps the most important comparison that can be made with the Arkansas and Pecos cases has to do with the escalating nature of the present violation by Nebraska. The proliferation of wells in each of the earlier cases had largely abated before the litigation commenced. Here, the proliferation of wells continues unabated, aggravating already serious depletions by Nebraska in

violation of the Compact. Moreover, the defendant States in the two earlier cases had State groundwater administration and enforcement in place. See N.M. Stat. Ann. §§ 72-12-1 et seq. (1978); Colo. Rev. Stat. §§ 37-90-101 et seq. (1990). Nebraska, on the other hand, has no statewide control of groundwater use. Rather, it is left to local natural resource districts whose boards of directors are composed of the water users themselves. See Neb. Rev. Stat. §§ 46-656.01 et seq.; § 2-3214 (Cum. Supp. 1996). Unfortunately, local control has amounted to essentially no control of groundwater use to protect surface flows.

2. The State of Kansas has No Alternative Forum

The second factor considered by the Court in determining whether to exercise its original jurisdiction is the availability of an alternative forum in which the issue tendered may be resolved. The controversy between the State of Kansas and the State of Nebraska is a controversy between States within the meaning of Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a). This Court is the only forum in which Kansas may seek a judicial remedy for violation of its rights under the Republican River Compact. Nor is the Republican River Compact Administration a viable forum for this dispute. As the Court stated in *Texas v. New Mexico*, 462 U.S. 554, 565 (1983), "Under the Compact as it now stands, the solution for impasse is judicial resolution of such disputes as are amenable to judicial resolution. " The impossibility of resolution of the present conflict through the Republican River Compact Administration, through joint legislative committee meetings, or

through intense mediated negotiations has been described *supra*, at 8-10. The Court has emphasized the need for a remedy in this Court for a State in Kansas' position. Kansas is suffering violations as a downstream State under a compact with an administrative body required to have unanimous concurrence of the States in order to act. *Id.* at 568-569 ("New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions. "). As Frankfurter and Landis said so persuasively three-quarters of a century ago, "[N]o one State can control the power to feed or to starve, possessed by a river flowing through several States." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 701 (1925) *quoted in Texas v. New Mexico*, 462 U.S. 554, 569 n. 15 (1983).

Kansas has exhausted all possibility of a negotiated settlement with Nebraska concerning her ongoing and escalating violations of the Republican River Compact. The only remedy available to Kansas for enforcement of its rights under the Compact rests within the original jurisdiction of this Court.

CONCLUSION

The Motion for Leave to File Bill of Complaint should be granted.

Respectfully submitted.

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May 1998

APPENDIX A

to

Brief in Support of Motion
For Leave to File Bill of Complaint

Session of 1998

House Concurrent Resolution No. 5030

By Special Committee on Energy and
Natural Resources/Environment

A CONCURRENT RESOLUTION requiring the Attorney General to bring suit against the State of Nebraska to enforce the provisions of the Republican River Compact.

WHEREAS, The Republican River is an important supply of water to citizens of the Republican River Basin in Kansas, providing a source of water for irrigation, municipal, industrial, recreational and other uses; and

WHEREAS, The Republican River is also a major tributary of the Kansas River and, therefore, a source of water supply for a substantial portion of the population of this state; and

WHEREAS, Shortages of water in the Republican River Basin in Kansas have a significant adverse economic impact on property values and incomes within the Basin, as well as on the economic welfare of the State as a whole, and reduced stream flow in the Republican River has a potentially negative impact on surface water quality; and

WHEREAS, The Republican River Compact was entered into by the states of Kansas, Nebraska and Colorado to provide for an equitable division of the waters of the Republican River Basin among the compacting states; and

WHEREAS, The loss of water to which Kansas is entitled under the Compact, as a result of the State of Nebraska's overuse, has hindered existing uses of water in Kansas and has discouraged economic development; and

WHEREAS, The State of Nebraska, for a number of years, has admitted consumptive use in excess of its allocations under the Compact; and

WHEREAS, The State of Kansas since at least 1985 has consistently expressed concern regarding the State of Nebraska's escalating overuse of its allocation under the Republican River Compact and the corresponding longer and more frequent shortages to the State of Kansas; and

WHEREAS, The State of Nebraska has increasingly refused to recognize that the use of groundwater in the Republican River Basin is subject to the limitations of the Republican River Compact and has failed to take sufficient regulatory action to fulfill the State of Nebraska's obligations under the Compact, including failure to implement an appropriate moratorium on the development of new wells and adequate regulation of existing groundwater pumping in the Republican River Basin; and

WHEREAS, The preliminary estimates of depletions caused by the State of Nebraska's failure to comply with the Republican River Compact appear to be two to four

times the amount of violations found by the Special Master appointed by the United States Supreme Court in *Kansas v. Colorado*, No. 105 Original; and

WHEREAS, The State of Kansas has sought the cooperation of the State of Nebraska in resolving the compact dispute through nonjudicial means, including mediation, but to no avail; and

WHEREAS, The State of Nebraska has refused to take any action to comply with the Compact; and

WHEREAS, The State of Nebraska has consistently vetoed any action proposed to the Republican River Compact Administration by the State of Kansas to address Kansas' concerns; and

WHEREAS, The State of Kansas as a last resort must now turn to litigation to enforce its rights under the Republican River Compact: Now, therefore,

Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein: That, in accordance with K.S.A. 75-702, the Attorney General of the State of Kansas is hereby required to file and prosecute an action against the State of Nebraska to enforce the provisions of the Republican River Compact, K.S.A. 82a-518.

APPENDIX B

Republican

LEGEND

- Lakes and Reservoirs
- County Lines
- State Lines
- Basin Boundaries
- Rivers or Streams
- County Seats

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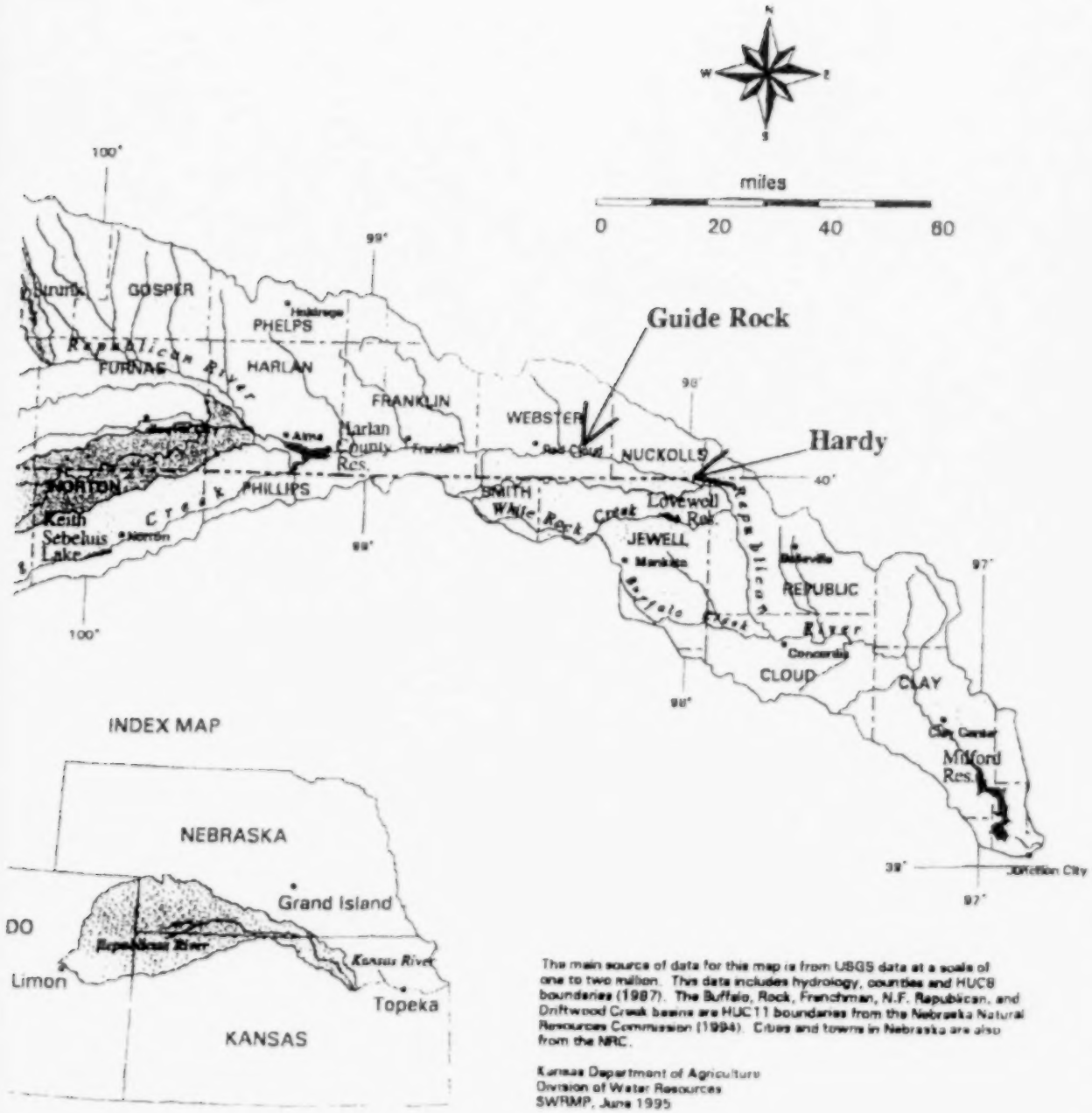
River Basin



The main source of data for this map is from USGS data at a scale of one to two million. This data includes hydrology, counties and HUC8 boundaries (1987). The Buffalo, Rock, Frenchman, N.F. Republican, and Driftwood Creek basins are HUC11 boundaries from the Nebraska Natural Resources Commission (1994). Cities and towns in Nebraska are also from the NRC.

Kansas Department of Agriculture
Division of Water Resources
SWRMP, June 1995

APPENDIX C

Number of Nebraska Wells in the Republican River Basin 1943 - 1996